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IN THE
COURT OF APPEALS OF INDIANA

NOAH W. KLUG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-0609-PC-537
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Judge
Cause No. 02D04-0603-FB-34

February 22, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Noah W. Klug (Klug), appeals his forty-nine year sentence for three counts of sexual misconduct with a minor, Ind. Code § 35-42-4-9, three counts of child seduction, I.C. § 35-42-4-7, and two counts of dissemination of matter harmful to minors, I.C. § 35-49-3-3.

We affirm.

ISSUE

Klug raises one issue on appeal, which we restate as the following: Whether the trial court abused its discretion by imposing consecutive fifteen year executed sentences on each of the three counts of sexual misconduct with a minor.

FACTS AND PROCEDURAL HISTORY

Between March 25, 2003, and March 24, 2005, Klug was over twenty-one years of age and lived with his girlfriend, Charlene Klug (Charlene), and her two daughters, M.K. and G.K. During that time, M.K. was between the ages of fourteen and sixteen. Throughout this time Klug engaged in sexual intercourse with M.K., performed digital penetration of the vagina on M.K., and engaged in and performed oral sex on M.K.

Between March 25, 2005, and January 10, 2006, Klug and Charlene were married. Klug, Charlene, and her daughters continued to reside together. M.K. was then between the ages of sixteen and eighteen years old. Klug continued to engage in the same sexual activities with M.K. At this time, G.K. was also under eighteen years of age. Klug showed both M.K. and G.K. pornographic videos.

On March 2, 2006, the State filed an Information charging Klug with Counts I-VII, sexual misconduct with a minor, Class B felonies, I.C. § 35-42-4-9; Counts VIII-XII, child seduction, Class D felonies, I.C. § 35-42-4-7; and Counts XIII and XIV, dissemination of matter harmful to minors, Class D felonies, I.C. § 35-49-3-3. On June 26, 2006, Klug pled guilty to three counts of sexual misconduct with a minor, three counts of child seduction, and both counts of dissemination of matter harmful to minors in exchange for the State dismissing the remaining counts. Sentencing was left to the discretion of the trial court with the executed portion ranging from twenty to sixty years.

On July 21, 2006, a sentencing hearing was held. The trial court found that Count I was "an ongoing series of sexual intercourse" with M.K., Count II was "an ongoing series of digital penetration," and Count III was "an ongoing series of oral sexual incidents." (Sentencing Transcript p. 20). The trial court also found the three counts of child seduction to be "extension[s] of those" incidents. (Sent. Tr. p. 20). And the trial court went on to find the "[d]issemination of [m]atter was in order to continue to perpetrate these offenses and are part of the offenses. But [that] they are clearly separate categories of offenses, separate qualitatively different offenses . . . ." (Sent. Tr. p. 21).

The ongoing nature of the offenses, Klug's violation of a position of trust, and the separate categories of the offenses were found to be aggravating factors. Klug's pleading guilty was the only mitigator recognized by the trial court. The trial court sentenced Klug to fifteen years executed for each of Counts I, II, and III, to run consecutively. Concurrent two year executed sentences were imposed for Counts VIII, IX, and X, to run consecutive to Counts I, II, and III, and concurrent two year executed sentences were

imposed for Counts XIII and XIV, to run consecutive to Counts I, II, and III, for an aggregate forty-nine year executed sentence.

Klug now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Klug claims the trial court abused its discretion by imposing consecutive fifteen year sentences for Counts I, II, and III, sexual misconduct with a minor. Specifically, Klug contends there is no factual basis from which to determine the acts of sexual misconduct were not inextricably intermingled, and thus did not represent a single episode of criminal conduct.

Sentencing decisions lie within the discretion of the trial court and will be reversed only for an abuse of discretion. *Baysinger v. State*, 854 N.E.2d 1211, 1214 (Ind. Ct. App. 2006). The trial court's discretion extends to determining whether to increase the presumptive sentence, to impose consecutive sentences on multiple convictions, or both. *Hull v. State*, 839 N.E.2d 1250, 1254 (Ind. Ct. App. 2005). However, I.C. § 35-50-1-2(c) limits a trial court's authority in imposing consecutive sentences if the convictions are not "crimes of violence" and the convictions "aris[e] out of an episode of criminal conduct." *Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006). I.C. § 35-50-1-2(c) provides in relevant part:

> [T]he court shall determine whether terms of imprisonment shall be served concurrently or consecutively . . . . However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under [I.C. §] 35-50-2-8 and [I.C. §] 35-50-2-10 [relating to habitual offender offenses], to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony

> higher than the most serious of the felonies for which the person has been convicted.

An episode of criminal conduct is defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." I.C. § 35-50-1-2(b).

In the instant case, Klug argues that there is no evidence in the record to prove the three incidents of sexual misconduct with a minor were not a single episode of criminal conduct; thus, he claims his sentence is inappropriate. He was charged with three Class B felonies and sentenced to fifteen years for each offense totaling forty-five years, when the advisory sentence for a Class A felony, a felony one class higher, is only thirty years. *See* I.C. § 35-50-1-2(c). Our review of the record indicates that Klug is partially correct.

Klug's attorney presented the factual basis at the guilty plea hearing. During the factual basis, no specific dates or times were ever mentioned. Rather, Klug's attorney essentially recited the charging information, which refers to long periods of time rather than specific instances; the State was "satisfied" with that factual basis. (Guilty Plea Transcript p. 28). However, as Klug so aptly points out, the factual basis on record does not disprove the offenses occurred in a single episode. Especially since Klug was originally charged with seven counts of sexual misconduct with a minor, without specific or distinguished dates and times there is no way to know when during the two year span each offense occurred. Thus, we must agree with Klug that the factual basis is insufficient with respect to determining the question of whether the offenses constitute a single episode of criminal conduct.

However, attached to the pre-sentence investigation report is a letter from M.K. In that letter she writes, ". . . then he finally talked me [into] having sex[. T]hen after that he always talked sexual to me[. T]hen one night [he] told me to stick his penis in my mouth." (Appellant's App. p. 57). We conclude, based on this letter, at least two of the three counts of sexual misconduct with a minor were not a single episode. As for the third count, we cannot be certain.

With respect to the sentence imposed by the trial court, however, we find no error. Whether the third count of sexual misconduct with a minor was part of the same episode as one of the first two episodes is irrelevant. If it was not a part of the same episode, the third fifteen year sentence consecutive to the other two is unobjectionable. And if the third episode was part of the same episode as one of the other two counts, the cap of the higher felony (thirty years for a Class A felony) is triggered. Here, the sentence imposed was fifteen years for each count and, therefore, there is no violation.

CONCLUSION

Based on the foregoing, we find the trial court did not abuse its discretion in sentencing Klug to three consecutive fifteen-year sentences.

Affirmed.

KIRSCH, C.J., concurs.

FRIEDLANDER, J., concurs in result.